SUPREME COURT, U. S.
APR 10 1975
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In the Supreme Court of the United States

No. 74-1137 October Term, 1974

IN RE: NATHAN BERLANT

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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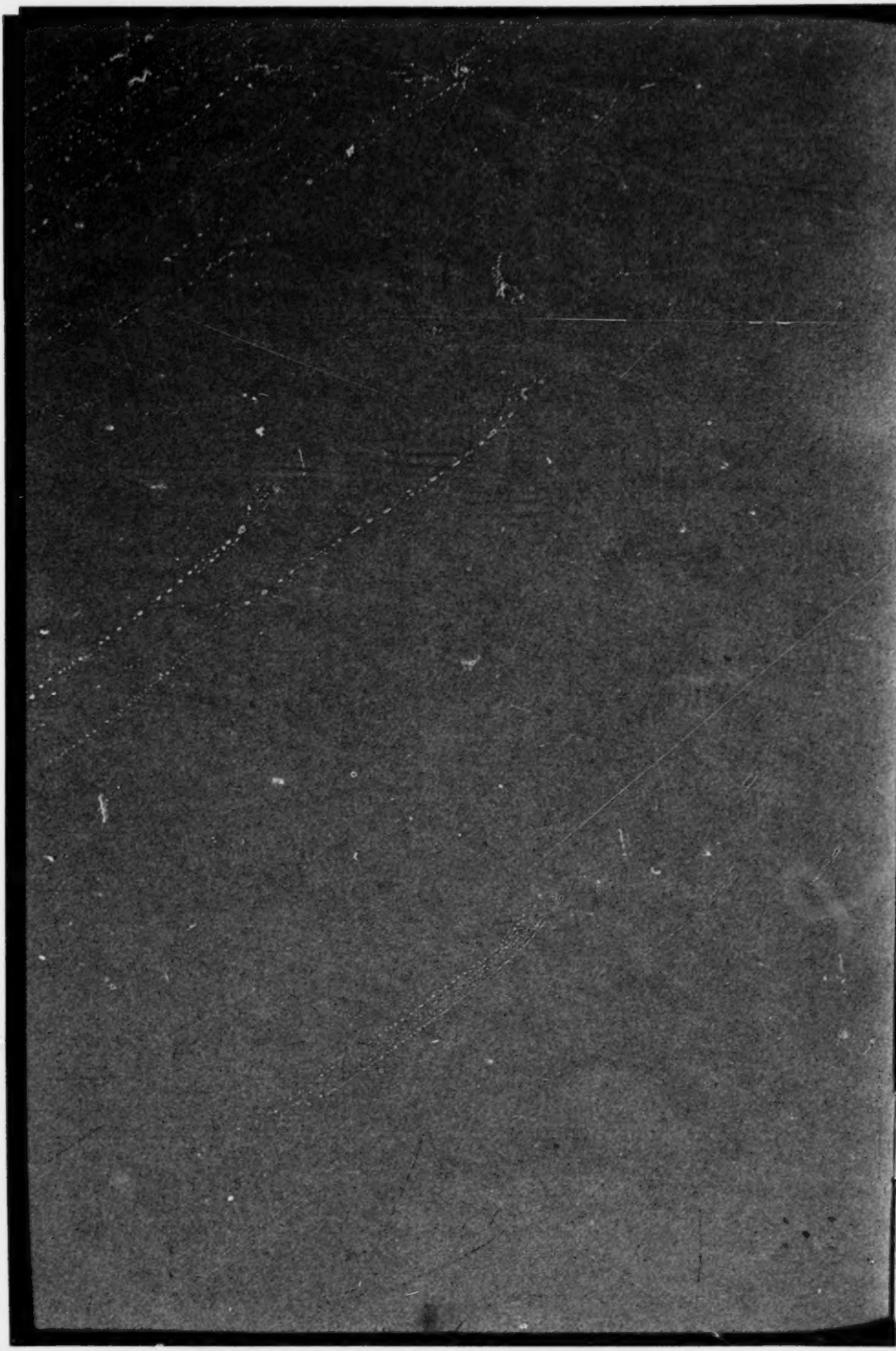

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COUNTER-STATEMENT OF THE CASE

In October, 1971, the Court of Common Pleas of Philadelphia ordered a special investigation into allegations of unethical solicitation of personal injury accident cases by members of its Bar. Petitioner Berlant's practice was the subject of that investigation and in June, 1972, he was charged with thirty-eight (38) counts of unethical conduct including fifteen (15) counts of solicitation, and eleven (11) counts of filing false retainer agreements with the Court of Common Pleas.

The charges were heard by three Common Pleas Judges in a full-scale adversary hearing, and Petitioner was found guilty of thirty-three (33) charges. The Court found that Petitioner had violated Disciplinary Rules 1-102(A)(2),(4),(5), 2-103(A), and 5-103(B) of the Code of Professional Responsibility of the American Bar Association. Petitioner was suspended from practice for five (5) years and appealed to the Pennsylvania Supreme Court. That Court reviewed the charges *de novo,* affirmed the lower Court's finding of guilt with respect to thirty (30) charges, and after denying a petition for rehearing, affirmed the lower Court's five-year suspension order. The instant petition to this Court followed.

Petitioner practiced law throughout the relevant period as a sole practitioner. He had a busy personal injury practice and at times employed a salaried asso-

ciate. Petitioner's office was in Petitioner's name only and the proven unethical conduct related entirely to Petitioner's practice. The cases involving misconduct were retained in Petitioner's name and he alone realized the profits from them. The evidence further revealed that Petitioner himself participated in all phases of the cases involved, and he was exclusively responsible for some phases of his practice.

Petitioner alleges three (3) errors by the Pennsylvania Supreme Court in support of his petition for certiorari: (1) A ruling that the due process clause of the Fourteenth Amendment to the United States Constitution does not require proof in attorney discipline proceedings to be beyond a reasonable doubt; (2) A finding that Petitioner was not prejudiced by a question asked on cross-examination relating to a prior claim of the privilege against self-incrimination; and (3) A finding of sufficent evidence of Petitioner's involvement in, or knowledge of, impropriety to support his guilt.

ARGUMENT

I. The Due Process Clause of the Fourteenth Amendment to the United States Constitution Does Not Require Proof Beyond a Reasonable Doubt in Attorney Discipline Proceedings

The Supreme Court of Pennsylvania rejected Petitioner's claim that the reasonable doubt standard of proof must be applied in attorney discipline proceedings. It reaffirmed its long standing principle "that a preponderance of evidence is necessary to establish an attorney's unprofessional conduct and the proof of such conduct must be clear and satisfactory" (21a-22a).

Petitioner's argument that the reasonable doubt standard must apply in disciplinary proceedings is based upon this Court's decisions in *In the Matter of Ruffalo,* 390 U.S. 544 (1968), and *In Re: Winship,* 397 U.S. 358 (1970). The argument is fallacious for several reasons.

Initially, it is not surprising that Petitioner cites no direct authority in support of his claim. Throughout all of the United States there is virtually unanimous adherence in disciplinary proceedings to a standard of proof less than reasonable doubt. Although the language of the standards varies from jurisdiction to jurisdiction, the generally accepted standard of proof

is preponderance of the evidence. 7 *C.J.S.,* Attorney and Client, §33, p. 784; 7 *Am. Jur. 2d,* Attorneys at Law, §67, p. 89.

In the *Winship Case,* supra, this Court held the reasonable doubt standard applicable to juvenile proceedings. In reaching that conclusion, the Court observed that unanimous adherence to a principle reflects a profound judgment about the way in which law should be enforced and justice administered. Here too, the Court is urged to follow the profound judgment of the highest Courts of virtually all jurisdictions in not requiring proof beyond a reasonable doubt in attorney discipline proceedings.

Petitioner argues that because this Court labeled attorney discipline proceedings "quasi criminal" in the *Ruffalo Case,* supra, the criminal standard of proof beyond a reasonable doubt is a necessary ingredient of due process in those proceedings. This simplistic approach to due process questions has been rejected by this Court in several recent cases. For example, in the *Winship Case,* supra, relied upon by Petitioner, the Court rejected the claim that civil labels to juvenile proceedings obviate the need for criminal due process safeguards in those proceedings. The Court in that case cited *In Re Gault,* 387 U.S. 1 (1967), where the label approach was also rejected in determining a juvenile's right to counsel. See also *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971). In each of these cases the Court rejected the label approach, thoroughly examined the nature of juvenile proceedings and found criminal due process safeguards a constitutional necessity. In the instant case as well, the "quasi criminal"

label to disciplinary proceedings, in itself, is meaningless with respect to the issue at hand, and should not automatically and peremptorily require the application of the criminal standard of proof.

This Court in deciding that the due process clause of the Fourteenth Amendment to the United States Constitution requires the application of the reasonable doubt standard to juvenile proceedings considered as the tantamount value the fact that juvenile proceedings carry the possibility of loss of freedom by confinement in a state institution. *Winship,* supra. There is, of course, no possibility of confinement in attorney discipline proceedings. Beyond that, there are no overriding constitutional rights or principles of right and justice relevant to attorney discipline proceedings which compel the application of the reasonable doubt standard to those proceedings. As Judge (later Justice) Cardozo said in 1928, "Membership in the Bar is a privilege burdened with conditions." *People ex rel. Karlin v. Culkin,* 248 N.Y. 465, 470-471, 162 N.E. 487, 489, 60 A.L.R. 851 (1928). This Court in 1957 quoted with approval Judge Cardozo's words and held that a Court's control over a lawyer's professional life derives from his relation to the responsibility of a Court. *Theard v. United States,* 354 U.S. 155 (1957).

In summary, disciplinary proceedings are not criminal in nature and the sanctions arising from such proceedings—censure, suspension, or disbarment—are not primarily designed for their punitive effects, but for their positive effect of protecting the public and the integrity of the Courts from unfit lawyers (Pennsylvania Supreme Court Opinion, 21a). Petitioner's

claim therefore, based solely upon the "quasi criminal" label, does not merit review by this Court.

II. The Pennsylvania Supreme Court Did Not Err in Holding That Petitioner Was Not Prejudiced by an Attempt To Cross-Examine Him With Respect to a Prior Claim of the Privilege Against Self-Incrimination

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Petitioner's second allegation of error is the failure of the Pennsylvania Supreme Court to find that an alleged prejudicial statement by the prosecutor in cross-examining Petitioner was one of constitutional proportion. This allegation is also without merit and does not justify this Court's granting certiorari.

Briefly stated, the record shows the following: Petitioner testified that he had never given anything of value to anyone for referring cases to him. He was asked on cross-examination if he had been questioned on that subject before the investigating Judge in an earlier inquiry. Counsel for Petitioner objected and was sustained by the trial Court. The prosecutor then stated in an offer of proof that the cross-examination would show that Petitioner had claimed his privilege against self-incrimination to the identical matter in the earlier proceeding and that the evidence was proper to impeach Petitioner's credibility. The Court refused to allow the cross-examination and denied Petitioner's motion for a mistrial.

Petitioner's argument is based upon the erroneous premise that the Pennsylvania Courts were bound

to specifically find that the alleged prejudice was harmless beyond a reasonable doubt. This premise is itself based upon the erroneous contention that the criminal standard of proof beyond a reasonable doubt is applicable to attorney discipline proceedings. That standard of proof does not apply (see argument above), so that the issue presented is not a federal question of substance reviewable by this Court.

Moreover, it is submitted that the matter was properly determined by the Pennsylvania Supreme Court. That Court in its opinion, after holding that the criminal standard of proof beyond a reasonable doubt was not applicable to attorney discipline proceedings (21a), ruled that there was no possibility of prejudice because no evidence of Petitioner's prior Fifth Amendment plea was introduced. That Court then went on to review the overwhelming evidence of Petitioner's unethical conduct in thirty (30) charges. The opinion of the Pennsylvania Supreme Court (20a-34a), as well as the opinion of the Court of Common Pleas of Philadelphia (1a-19a), reveals without question that the imposition of discipline was based solely upon the overwhelming evidence of Petitioner's unethical improprieties. It is clear from these opinions therefore that the reference of the prosecutor to Petitioner's prior claim of the Fifth Amendment could not have affected the Court's determination of guilt. The error, if it existed, was harmless, and does not present a federal question reviewable by this Court.

Finally, it is submitted that the attempt at cross-examination to impeach Petitioner's credibility was not improper under *Grunewald v. United States,* 353

U.S. 391 (1957), as Petitioner argues. In that case, the majority of this Court held that in a criminal jury trial the probative value of evidence of defendant's prior claim of the Fifth Amendment on the issue of his credibility was negligible and was outweighed by its possible impermissible impact on the jury, to wit, as direct evidence of guilt. That reasoning is inapplicable to a trial by three Common Pleas Judges.

For all of the above reasons, the petition for certiorari should be denied on this ground.

III. The Pennsylvania Supreme Court's Finding That Petitioner Was Guilty of Twelve (12) Counts of Unethical Solicitation and Ten (10) Counts of Filing False Retainer Agreements With the Court of Common Pleas Is Supported by Overwhelming Evidence That Petitioner Participated in, or Had Knowledge of, the Improprieties

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Petitioner concedes that the evidence supports a finding that the twelve (12) cases were solicited by runners, and that in ten (10) of those cases, retainer agreements filed with the Court of Common Pleas contained false statements relating to the source of the referral. He contends, however, that the Pennsylvania Supreme Court erred in finding that he participated in or had knowledge of the improprieties. Petitioner's claim in this regard is supported solely by a self-serving conclusion which is totally contradicted by the record. On the basis of that record, the Supreme Court

of Pennsylvania held that "several facts clearly support the inference that either a solicitation arrangement existed or, at the very least, that Appellant [Petitioner] knew of the solicitation when he accepted the cases" (31a).

The twelve hundred (1200) page trial record is not now before this Court, and it is thus difficult to fully apprise the Court of the extensive evidence upon which the Court of Common Pleas and the Pennsylvania Supreme Court based their findings. The following brief summary, however, based entirely upon the record, should persuade this Court that Petitioner's claim is without merit and does not justify the granting of certiorari.

In eleven (11) of the twelve (12) counts of solicitation, the solicitor, a stranger to the client, solicited the cases for Petitioner at the scene of an automobile accident, or soon thereafter at the accident victim's home. In seven (7) cases, the solicitor made an additional visit to the victim's home and in eight (8) cases provided the victim with transportation to the Petitioner's office and then to the victim's home after Petitioner's retainer was signed. In seven (7) cases, the prospective client was introduced to Petitioner in his office by the solicitor on the initial visit.

In ten (10) of the twelve (12) solicited cases, Petitioner filed with the Court of Common Pleas, pursuant to a rule of that Court, copies of his retainer agreement bearing false information regarding the source of the client's referral. The obvious inference, when viewed with clear evidence of solicitation, is that the false statement was made to cover-up the solicitation.

Three (3) of the false statements were in Petitioner's handwriting. With respect to five (5) of the statements, the client testified that the retainer agreement was prepared by Petitioner's associate and Petitioner was present when it was executed, or reviewed the agreement with the client immediately thereafter. In two (2) cases, Petitioner failed to file the retainer agreement and produced it at trial; these two (2) agreements also had false referral statements. In one (1) of the solicited cases, the prospective client was persuaded by the solicitor to withdraw a retainer with another lawyer and retain Petitioner because of the solicitor's representation that Petitioner would give her money on her case in advance of recovery. Another client testified that he was told by the same solicitor that Petitioner would advance up to $1,000 on the claim if Petitioner was retained. Petitioner admitted making financial advances to these two (2) clients as well as three (3) others.

In one (1) of the solicited cases, Petitioner attempted to influence the testimony of a client regarding the source of the client's referral in the Court's preliminary inquiry. Petitioner was charged with attempting to impede the Court's investigation as a result of that conduct and was found guilty. This attempt to solicit perjury justifiably supported the inference that Petitioner intended to cover up the solicitation because he had participated in it or had knowledge of it.

With respect to the charges of filing false retainer agreements not personally prepared by Petitioner, the Pennsylvania Supreme Court inferred Petitioner's

knowledge of the impropriety from evidence that he was introduced to the client by the solicitor on the initial visit to his office; he was present when the retainers were signed, or reviewed them immediately thereafter; the law office and practice were Petitioner's; all of the retainers were in Petitioner's name; Petitioner participated in all phases of the cases involved and was exclusively responsible for some phases; and that Petitioner had no partner responsible for the day-to-day operation of his office who could have acted without his knowledge. Finally, the Court of Common Pleas and the Pennsylvania Supreme Court concluded that the evidence, viewed as a whole, revealed a pattern of runners and wreck-chasers soliciting the personal injury claims of automobile accident victims for Petitioner (11a, 31a).

On the basis of the above evidence, it is submitted that Petitioner's claim of insufficient evidence is without merit and does not justify a review by this Court.

CONCLUSION

In conclusion, the Pennsylvania Courts have autonomous control over the professional conduct of lawyers admitted to the Bar of the Pennsylvania Courts. It is not for this Court to sit in judgment on Pennsylvania's disciplinary proceedings except within narrow limits for review. *Theard v. United States,* supra. Petitioner has not presented a federal question of substance and the case does not come within those narrow limits. The petition should, therefore, be denied.

Respectfully submitted,
WILLIAM P. STEWART,
Attorney for Respondent.